LeMond Cycling, Inc. v. Trek Bicycle Corporation Doc. 102

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LEMOND CYCLING, INC.,

Plaintiff,

v.

TREK BICYCLE CORPORATION,

Defendant and Third-Party Plaintiff,

v.

GREG LEMOND,

Third-Party Defendant.

Case No. 08-CV-1010 (RHK-JSM)

TREK'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER

Defendant and Third-Party Plaintiff Trek Bicycle Corporation submits this memorandum in support of its motion for protective order to prevent the disclosure of privileged work product and attorney-client communications that are irrelevant to Plaintiff's claims or defenses in this action.

Introduction

In the arena of high-profile, high-stakes litigation, developing and implementing legal strategy requires more than just the input of attorneys. To account for this reality, the law extends the work product and attorney-client privileges to protect information shared between attorneys and consultants in charting the client's legal strategy. Based on the intersection between legal strategy and public reaction in this hot-button case, Trek's attorneys retained a firm, Public Strategies, Inc., to ensure that litigation-related communications were consistent with Trek's overall litigation goals.

This motion addresses LeMond Cycling's desire to probe into the materials and thought processes related to counsel's retention of Public Strategies. The information sought is (1)

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irrelevant to the parties' contract claims and not reasonably calculated to lead to the discovery of admissible evidence; (2) protected by the work product doctrine; and (3) protected by the attorney-client privilege. As a result, the Court should grant Trek's motion for a protective order to insulate from disclosure information at the very heart of an attorneys' legal strategy.

Background

In Fall 2007, Greg LeMond elected to use the news media and threats of publicity associated with a highly-charged lawsuit to put leverage on his business partner, Trek. In a November 2007 article published in Europe, Mr. LeMond claimed he was pressured by Trek's CEO to retract statements Mr. LeMond made about seven-time Tour de France winner Lance Armstrong. (Declaration of Ralph A. Weber, Exhibit A at 6). In that same article, and repeated in another in January 2008, Mr. LeMond insinuated that "they held a gun to his head" to silence his accusations against Lance Armstrong. (Weber Decl., Ex. A. at 2 and B at 4). Then on February 15, 2008—approximately one month before he served his state court suit on Trek—Mr. LeMond was quoted in the San Jose Mercury News that "corporations" have turned a "blind eye" to alleged corruption in professional cycling. (Weber Decl., Exhibit C at 2). The implications of Mr. LeMond's comments – which were apparent to Trek at the time – would become crystal clear soon thereafter when LeMond Cycling served its Complaint in this action.[1]

Attempting to transform a contract dispute with Trek into a threatened sensational drama, LeMond Cycling filled its 34-page pleading with extraneous allegations concerning secret telephone recordings, Lance Armstrong, doping in professional cycling, baseball, and the Olympics, and other irrelevant topics. LeMond's strategy was obvious: threaten to trigger sensational publicity about Trek (and Lance Armstrong, a key Trek athlete) to gain the upper-hand in litigation and force Trek to capitulate to LeMond's demands. Trek's suspicions about

[1] On March 20, 2008, LeMond served its Complaint on Trek. LeMond eventually filed the Complaint in the Fourth Judicial District Court for Hennepin County on April 8, 2008.

LeMond's willingness to use publicity as leverage were recently confirmed by the deposition of Mr. LeMond's former agent, Warren Gibson, who testified that Mr. LeMond proposed using the threat of releasing secretly-recorded conversations with Trek's CEO to bully Trek out of terminating its relationship with LeMond:

> Q Did Greg tell you whether he had secretly taped Mr. Burke?
>
> A Yes, he did.
>
> Q What did he say?
>
> A Well, he indicated that he had tapes that – if there was at any time that Trek wanted to terminate his relationship, that he had tapes that would incriminate John Burke and that he felt that they were powerful enough that they – you know, that Trek would not terminate him.
>
> Q Do you have any understanding that Greg was going to use the tapes for leverage against Trek?
>
> MS. RAHNE: Object to the form. Go ahead.
>
> THE WITNESS: That was his intention.

(Deposition of Warren Gibson at 20-21, attached as Exhibit D to Weber Decl.).

Understanding that Trek's litigation success could be affected by the opinions of potential witnesses and jurors, especially on such hot-button topics involving a local icon, Trek's attorneys retained a public relations firm to assist counsel in the litigation with LeMond. On April 3, 2008, Gass Weber Mullins LLC ("GWM") retained Public Strategies, Inc. as a consultant to "assist [GWM] so that strategic internal and external communications are consistent with an in furtherance of Trek's litigation goals and strategies." (Weber Decl. ¶ 5 and Ex. E) (emphasis in original). GWM entered into a "Confidentiality and Non-Disclosure Agreement" with Public Strategies to confirm that the parties' communications were privileged, confidential and would involve protected work product. (*Id.* at Ex. E). The Agreement explicitly noted that GWM was retaining Public Strategies "in anticipation of litigation with Greg Lemond and

Lemond Cycling, Inc." (*Id.*) (emphasis in original). In noting that Public Strategies would have access to GWM's "mental impressions, legal strategies and other attorney work product," the parties agreed to treat any shared information as "strictly confidential." (*Id.*).

Pursuant to this retention, Public Strategies assisted GWM and Trek with developing a response to LeMond's lawsuit. (Weber Decl., ¶ 6). Public Strategies provided input on Trek's Complaint that was filed in the Western District of Wisconsin and contributed to additional legal decisions made by GWM as counsel for Trek. (*Id.*). Working together, GWM and Public Strategies shared their mental impressions and other confidential information with the goal of making sure that Trek's litigation message was clear and in conformity with its legal strategy in this action. (*Id.*). The input of Public Strategies was beneficial to GWM's legal advice to Trek. (*Id.*).

Consistent with its apparent goal of trying to make this case about anything other than the parties' broken business relationship, LeMond has sought the production of documents related to Public Strategies' work on behalf of GWM. LeMond specifically has requested "[a]ll documents related to work done with Public Strategies Inc. related to Trek's relationship with LeMond Cycling, Inc., Greg LeMond, or Lance Armstrong." (Weber Decl., Ex. F). Trek has informed LeMond of its objection to the information sought by LeMond. (Weber Decl. ¶ 7). Despite the parties' good faith attempts to resolve their differences without court action, they are unable to resolve this dispute over the discoverability of documents involving Public Strategies. (*Id.*). Trek now seeks a protective order from the Court to prevent the disclosure of privileged information that is irrelevant to either party's claim for breach of contract.

Legal Standard

According to Federal Rule of Civil Procedure 26(c), a protective order is warranted to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense."

Under this standard, the Court may issue a protective order to prevent against the disclosure of irrelevant information. *See Smith v. Dowson*, 159 F.R.D. 138, 140 (D. Minn. 1994). Similarly, a party is not entitled to discovery on any matter that is protected by either the attorney-client or work product privileges. *See* Fed. R. Civ. P. 26(b)(1) (extending scope of discovery to "nonprivileged" matters) and 26(b)(3). In a diversity case, such as this, a federal court should apply federal law to resolve claims of work product and state law to resolve claims of attorney-client privilege. *See Baker v. General Motors Corp.*, 209 F.3d 1051, 1053 (8th Cir. 2000).

Argument

I. Information Exchanged With Public Strategies Is Not Relevant to this Breach of Contract Action.

Under the Federal Rules, discovery is permitted into any matter "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1); *see also Knutson v. Blue Cross & Blue Shield*, 254 F.R.D. 553, 557 (D. Minn. 2008). Still, the Court should "remain reluctant to allow any party to 'roam in the shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.'" *Bredemus v. Int'l Paper Co.*, 252 F.R.D. 529, 533-534 (D. Minn. 2008).

Stripped to its essence, this is a case for breach of contract revolving around Trek's and LeMond's respective performances under their Sublicense Agreement. Trek claims that LeMond materially breached the Agreement in multiple ways, including taking repeated actions over the years that adversely impacted LeMond's brand. (Trek's Counterclaim and Third-Party Complaint, Dkt. # 44, at p. 13-18). LeMond, on the other hand, alleges that Trek did not use its best efforts and breached the implied covenant of good faith and fair dealing. (LeMond Complaint, ¶¶ 160-162).

Each party's claims depend on the conduct and circumstances surrounding their contractual relationship, not what GWM shared with Public Strategies *after* LeMond had already served its lawsuit. Rather than seeking information about the parties' historical business relationship, LeMond's request seeks irrelevant information tied to the strategic decisions made by counsel after "the die was cast" by LeMond's lawsuit. Because the requested information has no relationship to either party's claims or defenses, the Court should enter an order protecting Trek from the needless production of irrelevant information related to Public Strategies.

II. Information Produced By, or Exchanged With, Public Strategies is Protected from Disclosure by the Work Product Doctrine.

Even if somehow relevant (and it is not), any information GWM shared with Public Strategies or produced by Public Strategies would nonetheless be protected by the federal work product privilege. The work product privilege embodied in Federal Rule 26(b)(3) insulates from disclosure any documents (a) prepared in anticipation of litigation (b) by or for a party or its representatives, including attorneys or consultants. *See Onwuka v. Federal Express Corp.*, 178 F.R.D. 508, 512 (D. Minn. 1997). The work product privilege is broader than the attorney-client privilege because it extends beyond confidential attorney-client communications and reaches to all documents prepared "in anticipation of litigation." *Id.*

Rule 26(b)(3) provides two layers of protection – one for factual work product and a second, more absolute protection for "opinion work product." *Baker*, 209 F.3d at 1054. An opposing party can obtain factual work product only if it establishes a "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." *Id.*; Fed. R. Civ. P. 26(b)(3)(A)(ii). An even greater protection extends to opinion work product, which "enjoys almost absolute immunity" subject to very rare exceptions such as fraud. *Baker*, 209 F.3d at 1054; Fed. R. Civ. P. 26(b)(3)(B).

The information prepared for, or by, Public Strategies is quintessential work product immunized from disclosure by Rule 26(b)(3). First, GWM retained Public Strategies for assistance in anticipation of the litigation with LeMond. (Weber Decl. ¶¶ 5-6 and Ex. E). The

Court need to look no further than the written agreement between GWM and Public Strategies that explicitly states, in multiple places, that Public Strategies is being retained in anticipation of litigation to assist GWM to further "Trek's litigation goals and strategies." (Weber Decl., Ex. E). Indeed, Public Strategies' efforts wholly revolved around the Trek-LeMond litigation, and included input on GWM's legal strategy in representing Trek in this action. (Weber Decl., ¶ 6)

Second, the work product privilege extends fully to Public Strategies' work as a consultant to GWM. It is well-settled that the protections in Rule 26(b)(3)extend to work performed by third-party consultants retained by legal counsel. *See, e.g., Onwuka*, 178 F.R.D. at 513. As noted by the Supreme Court, the scope of the privilege comports with the reality that attorneys often must rely on others during litigation:

> [T]he [work product] doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys must often rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

United States v. Nobles, 422 U.S. 225, 239 (1975); *see also Onwuka*, 178 F.R.D. at 513.

The Supreme Court's observations are manifest here: GWM retained Public Strategies in this case to provide a service integral to furthering Trek's litigation strategy. Like an accountant in a shareholder dispute or a private investigator in a personal injury action, Public Strategies' work in this high-profile case assisted GWM in carrying out its representation of Trek. Recognizing the utility of similar efforts, federal courts have held that work by a public relations firm is privileged work product. *See, e.g., In re Copper Market Antitrust Litig.,* 200 F.R.D. 213, 220-221 (S.D.N.Y. 2001); *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 333-34 (S.D.N.Y. 2003). In *Copper Market*, for example, the district court held the public relations documents were privileged because they were "prepared in collaboration with [counsel] in the context of the litigation ensuing from the copper trading scandal." *Copper Market*, 200 F.R.D. at 221. The court protected from disclosure all documents "prepared by [the PR firm] or delivered to [the PR firm] in anticipation of litigation." *Id.* Because the documents requested by LeMond share the same attributes as the documents protected by *Copper Market*, the Court here should also prevent the disclosure of all documents related to Public Strategies' work on behalf of GWM.

Finally, there is no applicable exception to the protections provided in Rule 26(b)(3). Since the information shared with Public Strategies is not relevant to any claim or defense, LeMond does not have a "substantial need" for the documents to prepare its case. *Cf. Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000) (noting that "substantial need" is not satisfied by mere corroborating evidence; thus, it stands to reason that even weaker evidence would also fail to satisfy the exception). LeMond is similarly precluded from obtaining any information tending to reveal Public Strategies' or GWM's mental impressions, both of which enjoy ironclad immunity under Rule 26(b)(3)(B). Without any exception, LeMond cannot pierce the work product privilege that extends to the documents provided to, or produced by, Public Strategies in relation to this litigation.

III. Communications Between Trek, GWM and Public Strategies are Also Protected by the Attorney-Client Privilege.

Information shared with Public Strategies also enjoys a second layer of protection under the attorney-client privilege. In a general sense, the attorney-client privilege extends to communications between the client and its attorney related to the attorney's legal advice. *See Diversified Industries, Inc. v. Meredith,* 572 F.2d 596, 601 (8th Cir. 1977). To account for the realities of modern litigation, courts have expanded this traditional rule to cloak communications with consultants retained solely to assist the attorney with developing and implementing legal strategy for the client. *See In re Bieter Co.*, 16 F.3d 929, 937-938 (8th Cir. 1994); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961); *see also* 11 MN Practice Series, Evidence § 501.04 (3d ed. 2008). In particular, several courts have applied this practical standard to protect communications between the client, attorney, and a public relations firm retained specifically to assist with litigation. *See, e.g., Copper Market Antitrust* 200 F.R.D. at 219; *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 332; *F.T.C. v. GlaxoSmithKline*, 292 F.3d 141, 148 (D.C. Cir. 2002).

For instance, in *Grand Jury Subpoenas*, the district court recognized that public relations is a key component to the overall strategy in high-profile litigation. *Grand Jury Subpoenas*, 265 F. Supp. 2d at 327. In reaching this conclusion, the court pointed to the following comments by Justice Kennedy on the attorney's right to protect her client's legal position:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives.

Id. at 327 (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991)). To protect his client's interests, an attorney should have the ability to freely communicate with public relations specialists that provide a necessary service not found in many law firms. *Grand Jury Subpoenas*, 265 F. Supp. at 330 ("[D]ealing with the media in a high profile case probably is not a matter for amateurs. Target and her lawyers cannot be faulted for concluding that professional public relations advice was needed."). According to the court, if attorneys are unable to engage in frank discussions with their clients and retained public relations consultants about legal strategy and its implications, then the attorneys' ability "to perform some of their most fundamental client functions . . . would be undermined." *Id.*

The rationale espoused in *Grand Jury Subpoenas* underscores the applicability of the attorney-client privilege in this context. GWM retained Public Strategies to provide specialized advice that was necessary to Trek's efforts in this case, where every filing is prone to become a headline. In their meetings, Trek, its attorneys (both in-house and outside counsel), and Public

Strategies candidly discussed legal strategy, including Trek's response to the sensational allegations in LeMond's Complaint. These discussions were important to ensure a confluence between Trek's litigation strategy and its public statements, the latter of which could readily be scrutinized by potential jurors and witnesses. To avoid chilling important dialogue between clients, attorneys, and providers of important litigation-related advice, the Court should insulate from disclosure all communications between GWM, Public Strategies and Trek related to this litigation.

CONCLUSION

For the foregoing reasons, Trek requests the Court to enter an order protecting from disclosure all documents, communications, and other information exchanged between Trek, GWM, and Public Strategies related to this lawsuit.

Dated this 30th day of April, 2009

HALLELAND LEWIS NILAN & JOHNSON, P.A.

By: s/Benjamin J. Rolf

Erik T. Salveson (Reg. No. 177969)
Amanda M. Cialkowski (Reg. No. 306514)
Benjamin J. Rolf (Reg. No. 386413)
600 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402
Telephone (612) 338-1838
Fax: (612) 338-7858

and

Ralph A. Weber (State Bar No. 1001563)
Christopher P. Dombrowicki (State Bar No. 1041764)
Kristal S. Stippich (State Bar No. 1061028)
GASS WEBER MULLINS, LLC
309 North Water Street, Suite 700
Milwaukee, WI 53202
Telephone: (414) 223-3300
Fax: (414) 224-6116
Email: weber@gasswebermullins.com
dombrowicki@gasswebermullins.com
stippich@gasswebermullins.com

ATTORNEYS FOR DEFENDANT AND THIRD-PARTY PLAINTIFF TREK BICYCLE CORPORATION